Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	WC Docket No. 2-202
	)	
Petition for Emergency Declaratory	)	
And Other Relief	)	

Reply Comments of the International Prepaid Communications Association, Inc.*

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*In this matter IPCA does not purport to represent Verizon, Bell South, Qwest, AT&T or other members of the association that are also PSPs.

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INTRODUCTION AND BACKGROUND

THE INTERNATIONAL PREPAID COMMUNICATIONS ASSOCIATION, INC. (IPCA) respectfully submits these Reply Comments in the above proceeding.

IPCA's comments address the issues raised in the comments submitted by the American Public Communications Council ("APCC") in this proceeding. The APCC filing uses Verizon's Petition for Emergency Relief put forth its own *de facto* Petition which appears aimed at changing not only the U. S. bankruptcy code as well as Commission decisions in other dockets. In particular, APCC's filing amounts to a request for the Commission's assistance in obtaining exceptional treatment to recover losses ahead of other trade creditors in the wake of a tide of telecommunications carrier bankruptcies. In addition, it seems to be an effort to change Commission dial-around compensation rules which the Commission has repeatedly addressed in Docket No. 96-128. Accordingly, the Commission should deny APCC's request.

The IPCA is the national trade association for prepaid telecommunications and represents the prepaid phonecard industry comprised of many companies who utilize payphones for calls made without a coin drop. The association also participates in the Per Call Compensation Forum and is familiar with the issues related to dial-around compensation.

In view of the ongoing financial difficulties faced by the telecom industry, there is ample evidence that payphone service providers have suffered losses as have other vendors, suppliers and business partners. However, it is highly dubious that APCC's request to have the Commission shield it from existing bankruptcy law is appropriate. Members of many trade groups have experienced serious losses as a result of the current climate. It is impossible to grant every harmed party priority rights. Congressional intent in the passage of the bankruptcy code is clear – preferential treatment of one creditor over another is not part of those laws.

APCC's filing also asks the FCC to adopt the concept of "financial difficulty." The filing would have the FCC establish such a criteria for IXC's, and then when the FCC determines that an IXC is in financial difficulty, it would require certain actions on part of the IXCs. (We suggest that the process to define the term would require extensive staff and Commission time away from its current priorities, and require financial expertise that may not be found among Commission staff.) If an IXC did not cooperate with those actions, the petition asks that the FCC impose liability for the IXC's dial-around compensation debt on the clients of IXCs.

We further note that the filing amounts to a reversal of current Commission regulations regarding dial around compensation -- regulations which APCC promoted vigorously. Finally, we hold that using this docket to accomplish the APCC filing's goals is not appropriate in this proceeding and should be rejected as discussed in detail below.

I. <u>APCC's Request for Rules which would Provide for Collection of Prepayments From IXCs Conflicts With Existing Bankruptcy Law</u>.

The Commission must reject APCC's request for permission to require IXCs to provide advanced payments or deposits for dial-around compensation liability incurred by the IXCs under current FCC rules.

The APCC's request [1] conflicts with both bankruptcy law and Commission regulations. Section 547 of the bankruptcy code addresses the matter of debtor preferences. The APCC request asks the Commission to contravene it. The relevant Section plainly prohibits creditors from favoring one debtor over another.

Present FCC rules regarding dial-around compensation requires all IXCs to which a local exchange carrier (LEC) routes a coinless payphone call, to compensate the PSP for the completed call regardless of whether the call is completed by the IXC itself or handed off to a switch-based reseller (SBR)[2]such as a prepaid phonecard issuer. In practice, dial-around compensation payments are made in the ordinary course of business to PSPs quarterly, one quarter after the liability is incurred. Present rules contain no provision for pre-payment of that liability though Commission rules do provide for and encourage negotiated terms between IXCs and PSPs. APCC's filing, contrary to current rules, would have the FCC force IXCs who are <u>not</u> in bankruptcy to either prepay dial-around compensation or provide a security deposit, which would constitute a payment out of the ordinary course of the IXC's business, "if that IXC has poor payment performance or demonstrates objective indicia of credit risk.[3]" This APCC-proposed rule would require a company in the yet-to-be-defined "financial difficulty" to provide a payment out of the ordinary course of business.

The U.S. bankruptcy code (Title 11 §547) states that a debtor such as an IXC cannot prefer one creditor, such as the APCC or its member, over another. Specifically, Title 11, §547(b)(5)(B) & (C) require:

> Except as provided in subsection (c) of this section, the trustee

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1 See APCC Comments, p. 4, 5-7.

2 See pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Second Order on Reconsideration, 16 FCC Rcd 8098 (*Second Order on Reconsideration*)

> may avoid any transfer of an interest of the debtor in property that enables such creditor to receive more than such creditor would receive if – the transfer had not been made; and such creditor received payment of such debt to the extent provided by the provisions of this title.

Current law does not allow a creditor to force a debtor to prepay a debt. Today, any payphone service provider cannot force an IXC, whose payments of PSP compensation may not be due for another 6 months, to prepay that compensation before it is due.

As pointed out by Verizon in its petition, the Commission must harmonize its policies under the Communications Act with the bankruptcy code.[4] APCC's proposal, which would provide it with rights to which it would not otherwise be entitled under the bankruptcy code, would be wildly inconsistent with that principal.

II. <u>The Commission should Reject APCC's Request For Permission To Charge IXC Customers For Dial-Around Calls In Any Circumstances</u>

APCC's most audacious and dubious request is to have for permission to charge an IXC's customers for dial-around compensation in the event that an IXC refuses a PSPs request for a payment guarantee.[5] Although not expressly stated in APCC's comments, IPCA assumes APCC intends for switch-based resellers who purchase toll free services from IXCs to be the customers from whom APCC requests the Commission permit it to collect. As discussed above, current Commission rules require IXCs to compensate PSPs for each and every completed

3 APCC Comments, p. 4.
4 See Verizon Petition for Emergency Relief, p. 9 citing LaRose v. FCC, 494 F2d 1145 (D.C. Cir. 1974) LOOK UP
5 APCC Comments, p. 6.

coinless call made from a payphone.[6] APCC and its fellow payphone providers heavily lobbied for this relatively new rule that became effective barely eight months ago. Prior to the *Second Order on Reconsideration*, when an IXC routed a coinless payphone call to a switch-based reseller, it was the SBR who bore the responsibility for paying the PSP for compensation for that completed call, since it was the SBR who was able to track whether the call was completed.[7] If that rule remained in effect today, the PSPs risk would be spread out over perhaps hundreds of companies instead of a mere few, making the impact to the PSP from any one particular bankruptcy less severe. However bad APCC's decision may have been in advocating the first switch pays position, it is a dictionary example of "chuztpa" for APCC to try to undo that rule through this proceeding. To implement the new "first switch pays rule," SBRs and IXCs were forced to incur substantial costs to upgrade and implement new systems to provide for the data transfer. Indeed, thousands of man-hours and hundreds of thousands of dollars were spent on implementing the new payphone rules across the industry, not to mention the costs of substantial litigation. Now however, APCC would have the Commission undue those rules, and SBRs the guarantors of their IXC providers.

In this proceeding, such a request in this proceeding is wholly inappropriate and if the APCC wishes to request modification of the Commission's payphone compensation regulations, it should petition the Commission for reconsideration of its Payphone Orders. This issue raises serious issues, including but not limited to third party liability under the Uniform Commercial Code.

We draw attention to the fact that although the Commission has permitted --and in fact

6 See Second Order on Reconsideration, 16 FCC Rcd 8098 (2001)

7 See pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, CC Docket No. 96-128, 11 FCC Rce 21233, 21277 (1996) (*Payphone Order on Reconsideration*).

encouraged-- PSPs to enter into direct agreements with SBRs to address payphone compensation issues, few if any PSPs have expressed any willingness to negotiate direct relationships with SBRs. For the Commission to make IXC customers the guarantors for IXC debts to PSPs by forcing them to pay PSPs if their IXC providers fail to prepay, would be illogical, patently unfair, and discriminatory. The APCC's proposal could require SBRs to pay double compensation – to both the PSP and the IXC, a circumstance not only unfair and discriminatory but an invitation to massive litigation.

III. APCC's Proposal Requires Purchasers of Bankrupt Companies and Pay the Debts of Those Bankrupt Companies, is Contrary to Existing Bankruptcy Law

APCC asks that the Commission promulgate new rules that would grant PSPs the right to be first claimant when IXCs declare bankruptcy. APCC however, has provided no evidence to show why existing bankruptcy law is inadequate. Indeed, any attempt by the Commission to carve out exceptions to the existing bankruptcy code would undermine the essential purpose of bankruptcy law which is to protect the rights of creditors by severely hampering any potential sale of a bankrupt company's assets. Practically, there would be no marke for a bankrupt company if such purchase were not made free and clear of any liens, claims or encumbrances.

Section 363 of the United States Bankruptcy Code has clear and comprehensive rules addressing the use, sale or lease of property and provides authority for the sale of a bankrupt company free and clear of any liens, claims or encumbrances. While IPCA has no doubt that APCC members have suffered losses due to the spate of IXC bankruptcies, they are not alone. Virtually no member of the communications marketplace – or indeed the investor community— has remained unscathed. While IPCA sympathizes with PSPs' losses, these losses do not justify catapulting them over other debtors in bankruptcy court. Accordingly, the Commission should reject APCC's request that it promulgate rules that would ensure that purchasers of bankrupt IXCs existing customer accounts pay the dial-around compensation owed on those accounts. Such rules are clearly the purview of the bankruptcy court (See Title 11, U.S.C. §363 et seq.). To modify existing bankruptcy law, the appropriate course of action is to petition Congress to make changes in the law, not to request Commission assistance to void or twist skirt existing law. Thus, it is neither necessary nor appropriate for the Commission to attempt to supplant the judgment of the bankruptcy court or the bankruptcy code with new rules and regulations of its own.

CONCLUSION

The Commission should reject APCC's requests in this proceeding. In promulgating the rules comprising the bankruptcy code, Congress has fully addressed the rights and responsibilities of debtors and creditors within the purview of a corporate bankruptcy. It is inappropriate for APCC to attempt to encourage the Commission to implement rules so that these companies can circumvent existing bankruptcy law. Indeed, if it is believed that the bankruptcy rules are lacking, this issue should be handled by Congress – not the Commission.

Similarly, APCC should not be permitted to mount what is essentially a side-door petition for reconsideration of the Commission's Payphone Orders in this proceeding. First there is no reason to once again reopen and modify the Commission's payphone rules that were revamped only eight months ago to adopt the "first switch pays" rule advocated by APCC. No substantive or credible evidence as to why it is necessary to now modify those rules has been proffered. Accordingly, the Commission should deny the requests raised in APCC's Comments in this proceeding.

Respectfully submitted,

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